SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD, PETITIONER

vs.

JOSEPH NIEROTKO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 In the District Court of the United States for the Eastern District of Michigan, Southern Division

Civil Action No. 4064

JOSEPH NIEROTKO, PLAINTIFF

v.

THE SOCIAL SECURITY BOARD, AN AGENCY OF THE UNITED STATES DEFENDANT

Complaint

Filed January 14, 1944

Plaintiff says:

I

Plaintiff resides at 5751 St. Aubin, Detroit, Wayne County, Michigan, and within the jurisdiction of this court.

II

This proceeding is brought to review the decision of the appeals council of the Social Security Board entered June 17, 1943, in case No. S–217 entitled "In the case of Joseph Nierotko, Claimant; Joseph Nierotko, Wage Earner; Social Security Account No. 385–10–5766; Claim for Additional Wage Credits."

III

Jurisdiction to review said decision is conferred by 9A, F. C. A., Title 42, Section 42 (g), said section being Section 205 (g) of the Social Security Act, Amendments of 1940. That in accordance with said provisions the Social Security Board has extended the time within which to bring this action to January 15, 1944.

2 IV

The Ford Motor Company paid to the plaintiff the amount of $3,501.32 representing back pay due plaintiff for the period from February 2, 1937, to September 25, 1939, during which time he was discriminated against by the Ford Motor Company for union activities in violation of the National Labor Relations Act.

V

That said payment was made pursuant to the order of the National Labor Relations Board in the case entitled "In the Matter

of Ford Motor Company and International Union, United Automobile Workers of America" (14 N. L. R. B. 346). The United States Circuit Court of Appeals for the Sixth Circuit entered a decree on October 8, 1940, enforcing the foregoing order "in the case of National Labor Relations Board v. Ford Motor Company" 114 F. 2d 905). Petition for certiorari was denied by the United States Supreme Court on February 10, 1941 (312 U. S. 689). Said order requiring back pay was made pursuant to Section 10 (c) of the National Labor Relations Act. Said order and decision are hereby incorporated by reference.

VI

Defendant refuses to credit said payment to plantiff's Social Security Account as wages in accordance with the provisions of the Social Security Act because it holds that said amount does not constitute wages as defined in Section 210 (a) of the Social Security Act, 9A F. C. A., Title 42, Section 410 (a).

VII

The sole question in dispute and of which review is sought is whether said amount received pursuant to the provisions of the National Labor Relations Act constitutes wages.

Wherefore, plaintiff prays that this Court reverse the de-
3 cision of the Social Security Board and enter a judgment that plaintiff is entitled to have credited to his social security account the additional amount of $3,501.32 as wages in accordance with the provision of the Social Security Act.

MORTON A. EDEN,
One of the Attorneys for Plaintiff.

ERNEST GOODMAN and MORTON A. EDEN,
Attorneys for Plaintiff,
3220 Barlum Tower, Detroit 26, Michigan.

In United States District Court

Answer

Filed March 14, 1944

Now comes the Social Security Board, an Agency of the United States, defendant herein, by John C. Lehr, United States Attorney for the Eastern District of Michigan, and Arnold W. Lunger-

hausen, Assistant United States Attorney for said district, its attorneys, and answers the complaint herein as follows:

FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted, as is shown by the attached certified copy of the transcript of the entire record of the proceedings relating to the claim, including the plaintiff's request for a statement of the amount of wages credited to his old age and survivor's insurance account, testimony and evidence upon which the decision of the Appeals Council of the Social Security Board here complained of was based.

4 SECOND DEFENSE

2. The plaintiff is not entitled to a credit to his Social Security account, under the provisions of the Social Security Act, on the sum of $3,501.32, paid him by the Ford Motor Company on July 18, 1941, pursuant to the order of the National Labor Relations Board in the case entitled, "In the Matter of Ford Motor Company and International Union, United Automobile Workers of America," because said amount did not constitute "wages" as defined in Section 210 (a) of the Social Security Act (42 U. S. C. 410 (a)).

THIRD DEFENSE

3. The defendant admits the allegations contained in paragraphs 1, 2, and 3 of the complaint.

4. The defendant, in answer to paragraph 4 of the complaint, admits only that Ford Motor Company paid to the plaintiff the amount of $3,501.32, pursuant to the order of the National Labor Relations Board, as hereinafter set forth.

5. The defendant admits that the said payment was made pursuant to the order of the National Labor Relations Board in the case entitled, "In the matter of Ford Motor Company and International Union, United Automobile Workers of America" (14 N. L. R. B.), and that the United States Circuit Court of Appeals for the Sixth Circuit entered a decree on October 8, 1940, enforcing the foregoing order in the case of "National Labor Relations Board v. Ford Motor Company" (114 F. (2d) 905), and that petition for certiorari was denied by the United States Supreme Court on February 10, 1942 (312 U. S. 689).

6. The defendant admits the allegation contained in paragraph 6 of the complaint.

7. The defendant admits that the sole question in dispute is whether the amount received by the plaintiff pursuant to
5 the National Labor Relations Board constitutes wages within the meaning of the Social Security Act.

FOURTH DEFENSE

8. The defendant, in accordance with Section 205 (g) of the Social Security Act Amendments of 1939, files herewith as a part of its answer a certified copy of the transcript of the proceedings had before the Appeals Council of the Board in Case Number 5–217 entitled, "In the Case of Joseph Nierotko, Claimant; Joseph Nierotko, Wage Earner; Social Security Account No. 385–10–5766; Claim for Additional Wage Credits," including the evidence upon which the decision complained of is based.

Wherefore, the defendant prays for a judgment dismissing the complaint and for a judgment in accordance with Title II, Section 205 (g) of the Social Security Act Amendments of 1939, (42 U. S. C, Section 405 (g)), affirming the decision of the Board herein complained of, and for such other relief as may be appropriate.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant.

Certification of the Social Security Board

The Social Security Board, of the Federal Security Agency, by its duly authorized official Joseph E. McElvain, Chairman, Appeals Council, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Joseph Nierotko for additional wage credits under Title II of the Social Security Act, such transcript including claimant's request for a statement of the amount of wages credited to his Old-Age and Survivors Insurance ac-
6 count, testimony, and evidence upon which the decision of the Appeals Council of the Social Security Board was based.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of letter dated November 30, 1943, to Mr. Morton A. Eden, Attorney-at-Law, from Joseph E. McElvain, Chairman, Appeals Council, enclosing copy of Extension notice.

(2) Copy of notice of Extension of Time Within Which to File a Civil Action.

(3) Copy of letter from Morton A. Eden dated November 26, 1943, to Mr. Joseph E. McElvain, Chairman, Appeals Council, requesting an extension of time within which to file a civil action.

(4) Copy of letter to claimant enclosing copy of decision of Appeals Council.

(5) Copy of decision of Appeals Council.

(6) Copy of letter to claimant granting request for review of referee's decision.

(7) Copy of Request for Review of Referee's Decision.

(8) Copy of letter from referee to claimant enclosing copy of referee's decision.

(9) Copy of decision of referee.

(10) Copy of Notice of Hearing.

(11) Copy of Appointment of Representative.

(12) Copy of Request for Hearing.

(13) Copy of transcript of hearing held on April 19, 1943.

The following documents are attached to the above-mentioned transcript as exhibits introduced in evidence before the referee:

(14) Copy of Form OAR–7008 dated November 3, 1942, signed by Joseph Nierotko (Exhibit A).

7 (15) Copy of letter dated February 27, 1943, to Joseph Nierotko from the Social Security Board in regard to wages credited to his account (Exhibit B).

(16) Copy of Report of Contact dated April 19, 1943, made by a representative of the Social Security Board, after interviewing the Chief of the Employment Tax Division, Bureau of Internal Revenue, in Regard to taxes paid on Joseph Nierotko's wages (Exhibit C).

(17) Copy of letter dated April 29, 1943, from the Ford Motor Company directed to the manager of the Social Security Board Field Office at Dearborn, Michigan (Exhibit D).

In testimony whereof, Joseph E. McElvain, Chairman of the Appeals Council, pursuant to authority conferred on him by the Social Security Board, has hereunto set his hand and affixed the seal of the Social Security Board in the City of Washington, District of Columbia, this 1st day of March 1944.

[SEAL]

JOSEPH E. MCELVAIN,
Chairman, Appeals Council,
Social Security Board.

09:AC

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

NOVEMBER 30, 1943.

IN THE CASE OF JOSEPH NIEROTKO, CLAIMANT; JOSEPH NIEROTKO, WAGE EARNER; SOCIAL SECURITY ACCOUNT NO. 385-10-5766

MR. MORTON A. EDEN,
Attorney-at-Law,
Barlum Tower, Detroit 26, Michigan.

DEAR MR. EDEN: Pursuant to the request contained in your letter of November 26, 1943, the time within which to file a civil action in the above case is hereby extended to January 15, 1944. Enclosed is a copy of the Extension notice.

Sincerely yours,

JOSEPH E. MCELVAIN,
Chairman, Appeals Council.

Enclosure
msm/msm
cc—Referee Raymond, Mgr. F. O. Detroit, Michigan, Claimant.

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Extension of time within which to file a civil action

Case No. 5-217

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT); JOSEPH NIEROTKO; (WAGE EARNER); 385-10-5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

It appearing that the claimant will require additional time within which to bring a civil action for the purpose of reviewing the Appeals Council's decision, rendered on June 17, 1943, the time within which to bring a civil action is hereby extended to January 15, 1944.

APPEALS COUNCIL, SOCIAL SECURITY BOARD,
JOSEPH E. MCELVAIN, *Chairman.*

Dated November 30, 1943.

9

LAW OFFICES

MAURICE SUGAR

Barlum Tower

DETROIT 26, MICH.

Re: In the case of Joseph Nierotko, Claimant and Wage Earner; Social Security Acct. 385-10-5766

Mr. JOSEPH E. MCELVAIN,
Chairman, Appeals Council, Social Security Board,
1825 H Street NW., Washington, D. C.

DEAR SIR: In accordance with your letter of July 16, 1943, and our telephone conversation of several days ago, we hereby request an extension of time within which to bring a civil action to review the decision of the Appeals Council in the above case.

I would appreciate your prompt attention and your statement as to what date the extension is granted. Naturally we would prefer the extension to be as late a date as possible, inasmuch as it may not prove necessary to appeal the case at all if we obtain a prompt decision in the Cwikiel case. However, if necessary, we will commence the action at once. In any event we do not wish to forego our right of appeal in the Nierotko case.

Very truly yours,

MORTON A. EDEN,

mae: mar.
uopwa26cio.

09: AC

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FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

JUNE 17, 1943.

IN THE CASE OF JOSEPH NIEROTKO, CLAIMANT AND WAGE EARNER;
SOCIAL SECURITY ACCOUNT NO. 385-10-5766

Mr. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit, Michigan.

DEAR MR. NIEROTKO: There is enclosed herewith a copy of the decision of the Appeals Council on your claim for additional wage credits. This decision affirms that of the referee which held that you are not entitled to additional wage credits since the $3,501.32 which you received as a result of a ruling by the National

Labor Relations Board did not constitute "wages" as the term is defined in the original Social Security Act.

It is believed that the conclusion reached is clearly explained in the decision of the referee. If, however, you have any question with respect to the enclosed decision, it is suggested that you contact the nearest field office of the Social Security Board.

If you disagree with the enclosed decision and desire a review of the same, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205 (g) of the Social Security Act Amendments of 1939.

Sincerely yours,

JOSEPH E. MCELVAIN,
Chairman, Appeals Council.

jos: jos.

cc—Referee Raymond, F. O. Mgr., 510 Lafayette Bldg., Detroit, Mich. Morton A. Eden, Claimant's Representative.

11

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Decision of appeals council

Case No. 5-217

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT): JOSEPH NIEROTKO (WAGE EARNER): 385-10-5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

This case is before the Appeals Council upon request of Joseph Nierotko, the claimant, for review of the decision on his claim for additional wage credits which was rendered on May 13, 1943, by Lowell W. Raymond, Referee. The Appeals Council has given careful consideration to the claimant's contentions.

After thoroughly considering the entire record in this case, the referee's findings of fact and statement of reasons are hereby adopted and made a part hereof, and his decision is hereby affirmed.

APPEALS COUNCIL, SOCIAL SECURITY BOARD.
JOSEPH E. MCELVAIN, *Chairman.*

Dated June 17, 1943.

12 Form AC–520 (7–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Request for review of referee's decision

IN THE CASE OF JOSEPH NIEROTKO (NAME OF CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER'S NAME); 385–10–5766 (SOCIAL SECURITY ACCOUNT NUMBER)

CLAIM FOR ADDITIONAL WAGE CREDITS

To the Appeals Council:

I disagree with the referee's decision on the above claim and request that the Appeals Council review it.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

JOSEPH NIEROTKO (Signature).

09: AC
Claim No. 385–10–5766

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

JUNE 11, 1943.

MR. JOSEPH NIEROTKO.
5751 St. Aubin, Detroit, Michigan.

DEAR MR. NIEROTKO: This acknowledges receipt of your request for review of the decision rendered by Mr. Lowell W.
13 Raymond, the Referee who conducted the hearing in your case. The Appeals Council grants your request for review.

If you wish to do so, you may appear before the Appeals Council, in Washington, in person or by a representative, or both, and you may also file with the Council a brief or other written statement of your contentions. If you decide to appear before the Appeals Council in person, or by a representative, please advise by letter within ten days so that we can notify you of the date when the Appeals Council will hear your argument. If you file a brief, it should be mailed to this office within fifteen days from the date

of this notice; one copy of your brief should be sent with the original.

The transcript of evidence (except the exhibits) taken at the hearing held by the referee is being forwarded today to the Field Office of the Social Security Board, located at 510 Lafayette Building, Detroit, Michigan, for your inspection. The decision of the Appeals Council will be based upon that record alone unless additional evidence is accepted. Such additional evidence, however, will not be accepted or considered by the Appeals Council unless there is a good showing before hand that it is material and may affect the Council's decision.

Very truly yours,

JOSEPH E. MCELVAIN,
Chairman, Appeals Council.

cc—Morton A. Eden, Claimant's Representative.
leg:bs.

09:RO:V
MAY 13, 1943.

Mr. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit, Michigan.

DEAR MR. NIEROTKO: There is attached my decision in your case to the effect that the $3,501.32 which you received as a result
14 of a ruling by the National Labor Relation Board did not constitute "wages" as that term is defined in the original Social Security Act.

It is believed that the conclusion reached is clearly explained in the decision. If, however, you have any question with respect to this decision it is suggested that you contact the manager of the Social Security Board field office located at 510 Lafayette Building, Detroit, Michigan.

If you disagree with this decision, either as to the findings of fact or the application of the law, you have the right to request a review thereof by the Appeals Council of the Social Security Board, Washington, D. C. Such request must, however, be made in writing and filed within thirty days from the date of this letter and can be filed at any Social Security office.

Yours very truly,

LOWELL W. RAYMOND, *Referee.*

cc: Detroit (Main) FO Morton A. Eden, Attorney.

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Referee's decision

Case No. 5–217

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER); 385–10–5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

In a written statement made November 3, 1942, Joseph Nierotko, herein known as the claimant, said that between January 1937 and March 1942, inclusive, he had received from the Ford Motor Company wages in the amount of $7,916.05; that $3,501.32 of it had been paid to him pursuant to a ruling by the National Labor Relations Board, and that this amount pertained to the period from sometime in 1937 (when he was discharged for union activities) until August 1939.

The Bureau of Old-Age and Survivors Insurance of the Social Security Board, hereinafter mentioned as the Bureau, gave the claimant credit for all the wages claimed in his statement of November 3, 1942 except the item of $3,501.32. The Bureau held that he was not entitled to wage credit for the $3,501.32 because that amount did not constitute "wages" as that term is defined in the Original Social Security Act, but that it was in the nature of damages; and on February 27, 1943 the Bureau sent the claimant a letter to that effect. On March 19, 1943 the claimant requested a hearing, contending that the $3,501.32 should be considered "wages" for social security purposes. Under the circumstances the only issue to be considered at the hearing was whether the $3,501.32 constituted "wages" within the meaning of that term as defined in the Original Social Security Act.

The hearing was held on April 19, 1943 in Room 631, Lafayette Building, Detroit, Michigan. The claimant appeared and testified and was represented by his attorney. The claimant appeared to be credible and cooperative, and an examination of all the evidence reveals the following:

On or about February 2, 1937, the Ford Motor Company, hereafter referred to as the company, discharged the claimant because of union activities; at that time the company removed him from the payroll and did not consider him an employee for any purpose from then until he was reinstated. The evidence indicates that between February 2, 1937 and on or about September 1939, when

he was reinstated as an employee of the company, the claimant did not work for anybody but lived on his savings and his wife's earnings.

The rights of the claimant and the rights of a number of
16 other discharged employees of the company, were considered by the National Labor Relations Board; and on August 9, 1939 this Board issued a "Decision and Order," commanding the company to

1. "Cease and desist from" doing several specific acts; and in addition, to

2. "Take the following affirmative action, which the Board finds will effectuate the policies of the Act."

(a) Offer reinstatement to twenty-four of the employees involved (including the claimant) "without prejudice to their seniority and other rights and privileges."

(b) "Make whole the persons named in paragraph 2 (a) above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to them, respectively, of a sum of money equal to that which each would have earned as wages during that period from the date of such discrimination against him to the date of the offer of reinstatement, less his net earnings during that period; deducting, however, from the amount otherwise due to each of the said employees, monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work-relief project. * * *." (Case C-199, Volume 14, Decisions and Orders of the National Labor Relations Board: In the matter of Ford Motor Company and International Union of United Automobile Workers of America.)

That part of the foregoing order requiring the company to reinstate and to "make whole" the twenty-four employees, was amended by the Circuit Court of Appeals for the Sixth Circuit, by striking from the list of twenty-four an employee named Emil Tomkow; but on December 5, 1940 this court issued an amended decree [original decree was dated October 8, 1940] commanding
enforcement of *that part* of the order as it applied to the
17 other twenty-three employees. (National Labor Relations Board vs. Ford Motor Company; 114 F. 2d. 905); and on February 10, 1941 the United States Supreme Court (312 U. S. 689) denied a petition in this case for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

As previously indicated the claimant was reinstated and returned to work for the company on or about September 1939; and in accordance with the order which had been issued by the National Labor Relations Board, and which had been enforced in part by the Circuit Court of Appeals for the Sixth Circuit, the

company paid the claimant "back pay" of $3,501.32. According to the company, the payment was made July 18, 1941 and covered the period from February 2, 1937 to September 25, 1939.

APPLICABLE LAW AND REGULATIONS

In determining whether the $3,501.32 constituted "wages" for social security purposes, one must apply the definitions of "wages" and "employment" as found in the Original Social Security Act and must be kept constantly in mind the fact that a person may be an employee for purposes of the National Labor Relations Act but at the same time not be an employee for the purposes of the Social Security Act.

Section 210 (a) of the Original Social Security Act (which governs the determination of "wages" for periods prior to 1940) provides that, "The term 'wages' means all remuneration for employment * * *."

Section 210 (b) of that Act (which governs the determination of "employment" for periods prior to 1940) defines "employment" as "any service, of whatever nature, performed * * * by an employee for his employer * * *." And to assist in administering Section 210 (b) *supra* the Social Security Board issued Article 2 of Regulations No. 2, which provides in part that "To constitute an employment, the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them." Therefore, the $3,501.32 cannot be considered "wages" for social security purposes unless the legal relationship of employer-employee existed between the claimant and the company during the period between the date of discharge and the date of the company's offer of reinstatement.

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Article 3 of Regulations No. 2 (which in effect defines "employee" for social security purposes) provides further that the legal relationship of employer and employee generally "exists when the person for whom services are performed has the right to control and direct the individual who performs the services, "not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done * * *. The right to discharge is also an important factor indicating that the person possessing that right is an employer."

That such a relationship existed between the claimant and the company up to February 2, 1937 is admitted; but when the company discharged the claimant that relationship, as defined by the foregoing regulations, was automatically terminated, and was evi-

dently so regarded by both parties: the company thereby lost all right of direction and control over the claimant, and he was thereby released from all duty to the company. That holding has been justified by the Supreme Court of Michigan. In the case of Stitt v. Locomotive Engineers Mutual Protective Association (142 N. W. 1110, 1113, 177 Mich. 207), the Supreme Court (in discussing the term "discharged" as applied to the relationship of master and servant) said, "A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him, and all contract relations are at an end." And that conclusion is strengthened by the definition of "employee" in Section 2 (3) National Labor Relations Act. In defining "employee" this section says in part, "The term 'employee' shall include * * * any individual whose work has ceased as a consequence of * * * and who has not obtained any other regular and substan-
19 tially equivalent employment * * *." In other words, for purposes of the National Labor Relations Act an "employee" may be a person whose services for his employer has ceased, a person whose "employment" as that term is used for social security purposes has ceased. And to hold that a "back pay" order by the National Labor Relations Board restores for a retroactive period a contractural right of direction and control (necessary to the legal relationship of employer-employee for social security purposes) which in the minds of both parties to the contract has been terminated, and which at the time of the Board order could not possibly be exercised for that retroactive period, would seem to do violence to the most basic concepts of jurisprudence.

A further indication that a "back pay" order does not presuppose (for the period in question) an employer-employee relationship as defined in Social Security Board Regulations No. 2 supra, is the fact that the National Labor Relations Board has authority to order "back pay" for an individual who has *never* been employed by the employer in question, and who could not possibly have had an employer-employee relationship with that employer (for social security purposes) during the period covered by the "back pay" order. In fact, the National Labor Relations Board and the Federal courts have repeatedly held that an employer-employee relationship (as defined by the Social Security Board) need not be established before a "back pay" order can properly be issued (see Referee's discussion of this question and citations, infra).

Whether an employer-employee relationship *as defined by Social Security Board* regulations is automatically terminated when an employer discharges an employee, is a question, the answer to which is not affected by *any* order subsequently issued by the

National Labor Relations Board; the answer remains the same whether the Board orders reinstatement with or without back pay, or whether it merely orders the employer to put the employee on a preferential hiring list. But the orders usually issued by that Board and the language of the National Labor Relations Act itself seem to reveal a Congressional understanding that that relationship terminates at discharge. In practically every case where the Board has found that an employee has been discharged because of unfair labor practices, it has required the employer to offer reinstatement (with or without back pay); and when the Board orders reinstatement, it contemplates that the employee will return to the same task or its equivalent; but if changed conditions make that impossible, the Board will amend its order to the effect that the employee be put on a preferential hiring list (see Republic Steel Case; November 18, 1939 (C.C.A. 6) 107 F. (2nd) 472; 309 U. S. 684). That act requiring the employer to put the employee on a preferential hiring list, implies that the employer-employee relationship (as defined in Social Security Board regulations) which has been illegally terminated nevertheless *has been actually terminated*. The person involved, however, just as in a case of *reinstatement*, may still be an "employee" within the meaning of the National Labor Relations Act (Acme Air Appliance Case; January 25, 1939; Vol. 19, D. & O. National Labor Relations Board 1-85, 1406-7, 14-). And the same implication is found in the language of the usual Board order (like the one in this case) which commands the employer to offer *reinstatement*. "Reinstatement" is the word used in Section 10 (c) of the National Labor Relations Act, and according to Webster, it means "To restore to a former state, station or authority." In other words, the offer of reinstatement is an offer to restore *presently* the employer-employee relationship (as defined by Social Security Board Regulations No. 2) and an offer to restore *retroactively* the status of an "employee" as defined by the National Labor Relations Act. Accordingly, the language of the National Labor Relations Act and of the Board order in this case clearly implies that the employer-employee relationship (as defined for Social Security purposes) did not exist between the date of the wage earner's discharge and the date of his offer of reinstatement.

Since, therefore, there was no employer-employee relationship between the claimant and the company between February 2, 1937 and September 1939 *within the meaning of the Social Security Act*, there was no "employment" as defined by that Act.

Furthermore, according to the social security law quoted above, there can be no employment without the performance of services; the evidence indicates that the claimant did not perform any services (actual or constructive) for the company during the period in question, and it is not even contended that he did. The old English doctrine of "constructive service" is in general disrepute in American courts as well as in many English courts, and even where recognized the doctrine applies to a situation in which an employee, under a contract of employment for a *specific* term, is dismissed without cause (but holds himself ready to perform the service contracted for)—a situation quite unlike the one involved in this case, and for that reason, need not be discussed here. It is advisable, however, to mention a recent Federal decision which has been interpreted by one writer as authority for applying the "constructive service" theory to orders issued by the National Labor Relations Board (Michigan Law Review, August 1942, p. 80, Volume 41).

In the case of National Labor Relations Board vs. Killoren (C. C. A. 8th Circuit (1941) 122 F. (2nd) 609), a "back pay" order had been issued against a company employer, but before the order was complied with, the company went bankrupt, and the question before the court was whether the "back pay" order constituted a prior claim against the assets of the company. Under bankruptcy law wages earned by the company's employees would ordinarily be considered as entitled to priority. A divided court held that National Labor Relations Board "back pay" was wages whose status (under the circumstances) was the same as unpaid wages earned by other employees in the normal course of the employer's business, and the court used this language:

> "We have declared above that a back pay allowance, under the provisions of the National Labor Relations Act is intended as, and constitutes, wages which a workman has constructively earned by reason of his continued status as an employee."

But elsewhere in the decision the court referred to the "back pay" in these words, "It is compensation to which he is entitled by reason of his continued status *under the Act* as an employee, and which the Act and the Order of the Board regard him as having constructively earned." [Italics supplied.] In other words, the court's "constructively earned" theory was based on the person's continued status as an "employee" as that term is defined in the National Labor Relations Act; and as already indicated, such an employee may be a person whose "employment" (as the term is defined in the Social Security Act) *has ceased*. Accordingly, this

Federal case is not authority for holding that during the period in question a person who received "back pay" under a National Labor Relations Board order, rendered "constructive services" (and was engaged in "employment") for Social Security purposes.

Under the Original Social Security Act the Social Security Board has sometimes recognized as "wages" certain payments like vacation pay, sick pay, etc. (Regulations No. 2, Article 15 (b)) made to employees for periods in which apparently no actual service was performed. Neither the Social Security Act nor Social Security Board Regulations issued to aid in its administration indicate whether such payments were considered "wages" because they constituted pay for *constructive services* rendered during the period involved, or whether they were considered "wages" because they represented pay for *actual services* rendered previously; but a determination of this question is not important here because in every such case the payment was made for services rendered in a period in which there was an employer-employee relationship *as defined by Social Security Board Regulations*.

Therefore it must be held that the claimant did not perform any services for the company between February 2, 1937 and
23 September 1939, and that for this reason, too, he was not engaged in "employment" (for Social Security purposes) during that period.

It may be argued that the portion of the Order issued by the National Labor Relations Board which commanded the company to "make whole * * * for any loss of pay * * * by payment * * * of a *sum of money* equal to that which each would have earned as wages during that period * * *" [italics supplied] was intended to give the claimant social security wage credit for the amount paid. The Order doesn't say so. The language beginning "by payment" and ending with "period" indicates persuasively that as to this part of the order, the National Labor Relations Board had in mind making the claimant "whole" financially by paying him a sum of money without any thought as to how that sum would be considered for such purposes as Unemployment Compensation, Old-Age Benefits, etc. As a matter of fact the language of the order shows convincingly that the Board did not regard the "back pay" as wages earned during the period involved. Note that it says, "sum of money equal to that which each would have earned during the period in question."

In this connection we should remember that the main objective of the National Labor Relations Act was to promote better relations between employers and employees by preventing unfair labor practices; and that to achieve that end Congress authorized the

National Labor Relations Board (Section 10 of the National Labor Relations Act) to issue, cease and desist orders and "to take such affirmative action, including *reinstatement of employees with or without back pay*" [italics supplied] as seems necessary to carry out the purpose of the Act. A "back pay" order is merely one of the results of the power granted to the National Labor Relations Board to promote better relations between employers and employees; the Act does not even suggest that the "back pay" is remuneration for services. An employee, like the claimant in this case, has no *right* to demand compensation from the employer for the period involved; and it is for the National Labor
24 Relations Board to determine (in any case) whether the reinstatement will be "with or without back pay." In this connection the Federal courts have held that the National Labor Relations Act does not confer any right of action triable by jury or otherwise as between employer and employee; that it does not authorize an employee to make a claim; that it does not even purport to confer private rights on an employee, and that the procedure outlined by the statute is not designed to award damages as such. In making a decision to this effect the Federal court said, "The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure looking only to public ends. The statute has in mind the maintenance of industrial amity, and therefore peace, the prevention of industrial war.

* * * * *

"The statute authorized reparation orders not in the interest of the employee, but in the interest of the public. A cease and desist order operating retrospectively is not a private award, operating by way of penalty or of damages. It is a public reparation order, operating retrospectively by way of an order to cease and desist as to unfair practices from their beginning; practices as to which, because forbidden in the interest of industrial amity, and therefore peace, Congress has the right to eradicate them as from the beginning." (Agwilines, Inc. v. National Labor Relations Board, 87 F. (2nd), 146.)

Therefore, the very nature and objective of a National Labor Relations Board's action in ordering reinstatement "with back pay" indicates that the amount so paid *is not considered by the National Labor Relations Board as remuneration for services rendered.*

And that conclusion is strengthened by the fact that (as previously mentioned) the National Labor Relations Board has authority to grant "back pay" to an individual who has never been employed by the employer in question, and who, therefore, could

not possibly have had with that employer an employer-
25 employee relationship *for social security purposes*. In the Waumbec Mills Case (National Labor Relations Board Case No. C–715) an employer refused to hire two individuals because of their past union activities. These two individuals filed charges against the employer with the National Labor Relations Board. The Board ordered reinstatement with "back pay" holding that that part of the National Labor Relations Act (Section 10 (c)) which reads, "including reinstatement of employees with or without back pay * * *" did not mean that the employer-employee relationship (as defined in Social Security Board Regulations No. 2 supra) must be established before the proscriptions of the Act could be applied, but that the language just quoted was only suggestive of the broad Board power to remedy a violation. The Circuit Court of Appeals sustained that principle (National Labor Relations Board vs. Waumbec Mills Incorporated, 114 F. (2nd) 226, CCA–1, 1940); and that principle has also been confirmed by the United States Supreme Court (Phelps Dodge Corporation vs. National Labor Relations Board, 86 L. Ed. 753 (1941).[1] And in several other cases the National Labor Relations Board has required employers to offer employment to and to pay "back pay" to men whom they had never employed.

But there is another cogent reason for concluding that "back pay" as used in the National Labor Relations Act was not intended to mean remuneration for services rendered, and was not intended to give the employees concerned wage credit for social security purposes. In this case, as in the usual case, the Board's order commanded the employer to pay to the employee concerned "a sum of money equal to that which each would have earned as wages during the period from the date of such discrimination against him to the date of the offer of reinstatement, less his net earnings during that period; deducting, however, from the amount otherwise due to each of the said employees, monies received by
26 said employee during said period for work performed upon Federal, State, county, municipal, or other work-relief projects." And that provision was in harmony with the Supreme Court's ruling in the case of Republic Steel Corporation vs. National Labor Relations Board (311 U. S. 7). In that case the Board had directed the company to deduct from back payments to the reinstated employees the amounts they had received for work performed upon work-relief projects; and in its decision the Supreme Court said: "The amounts earned by the employees before reinstatement were directed to be deducted from their back

[1] 313 U. S. 177.

pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had earned the amount in public or private employment."

Accordingly, it is obvious that the objective of the "back pay" order is merely to make good the financial losses accruing to the employee because of the employer's violation of the law, by requiring the employer to reimburse the employee to the amount he "would have earned" if he had continued to work for the employer during the period in question, less the specified deductions. It is even more evident that it is not the objective of a "back pay" order to give the employee social security wage credit in the amount he "would have earned" if he had continued to work for the employer during the period in question. If that was one of the objectives of a "back pay" order, it could be accomplished only by ordering payments of the *entire amount* which the employee "would have earned," less earnings received during that period which can be considered "wages" under the Social Security Act. But the National Labor Relations Board order doesn't do that. In computing "back pay" the Board is required to deduct from the amount which the employee "would have earned" *any* earnings of the employee during that period, including pay received in the employ of the United States, or a State or a political subdivision thereof—pay which cannot be considered "wages" under Sections 210 (a) and 210 (b) of the Original Social Security Act.

27 And it seems self-evident that if the National Labor Relations Board were authorized to give Social Security wage credit in its effort to "make whole" an employee, it would give such credit for the entire amount which he "would have earned," and not merely for part of it.

While it is not essential to a decision in this case, the Referee believes it pertinent to observe that under the National Labor Relations Act the National Labor Relations Board does not appear to have any authority to determine what constitutes "wages" or "employment" for social security purposes. The Board's total authority, if any, with respect to these matters is contained in that part of Section 10 (c) of the National Labor Relations Act which authorizes it to order an employer "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate *the policies of this Act*." [Italics supplied.] And those policies are explained by Section 1 of the National Labor Relations Act in these words:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions

when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

From the foregoing it is clear that the National Labor Relations Board's jurisdiction in these matters is limited by the policies of the Act, and it is equally clear that these policies do not directly or impliedly authorize the giving of social security wage credit.

But there is a more compelling statutory reason for concluding that Congress did not give the National Labor Relations Board any authority to determine "wages" or "employment" for social security purposes. If the National Labor Relations Act does confer such authority, it is to that extent in conflict with the Social Security Act, and the National Labor Relations Act should state (as it does concerning other conflicting statutes) that when such conflict exists its provisions shall prevail. Section 14 of the National Labor Relations Act as originally passed (July 5, 1935) and as amended (June 25, 1936 and December 6, 1941) provides that whenever application of certain specified statutes conflicts with application of the provisions of the National Labor Relations Act, the provisions of the latter "shall prevail," but the Social Security Act is not one of the statutes specified, although it was nearing passage on July 5, 1935 and was enacted August 14, 1935, ten months prior to the first amendment to the National Labor Relations Act, and more than two years before the second amendment to that Act. Therefore, in view of these facts, and without considering accepted rules of statutory construction which would only strengthen the following conclusion, it is reasonable to hold that the National Labor Relations Board could not legally order that a "back pay" amount like the $3,501.32 be considered "wages" *for social security purposes*.

It is clear from the foregoing that an employer-employee relationship did not exist between the claimant and the company during the period involved; that the claimant did not render any services for the company during that time; and that the payment of $3,501.32 was not given to the claimant as remuneration for services performed by him for the company. Consequently, the only decision which the Referee can legally make is that this amount did not constitute "wages" as that term is defined in Section 210 (a) of the Original Social Security Act.

LOWELL W. RAYMOND, *Referee*.

Date May 13, 1943.

29 Form AC–507 (7–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Notice of hearing

IN THE CASE OF JOSEPH NIEROTKO (NAME OF CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER'S NAME); 385–10–5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

To MR. JOSEPH NIEROTKO,
3761 St. Aubin, Detroit, Michigan.

In response to a written request in the above case, a hearing will be held by the undersigned, a referee of the Social Security Board, on the 19th day of April 1943 at 9:00 A. M. o'clock in Room 631 of Lafayette Building, Detroit, Michigan. If you cannot be present at that time please notify me at once.

You may present at the hearing any evidence on the issues, either in the form of written documents or the oral testimony of witnesses.

You may call upon the manager of the Field Office located at 510 Lafayette Building, Detroit, Michigan, for information and advice with regard to the hearing.

Remarks:

Referee
521 Union Commerce Building, Cleveland, Ohio.

Date April 5, 1943.

30 Form AC–512 (7–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

Appointment of representative

I appoint Morton A. Eden to act as my representative with respect to my claim under the Social Security Act, growing out of the employment of Joseph Nierotko.

The above-named representative is authorized to obtain from the Bard nformation concerning my claim; and it is understood

that any notice or request sent to him shall have the same force and effect as if sent to me.

JOSEPH NIEROTKO.

Date April 19, 1943.

ACCEPTANCE OF APPOINTMENT BY ATTORNEY

I accept the above appointment. I have been admitted to the practice of law, and I am in good standing in (1) the courts of the State of my residence and (2) the Federal Courts.

(Note: The attorney may strike out (1) or (2) if he is not admitted to both the Federal and State Courts.)

MORTON A. EDEN,
3220 Barlum Tower, Detroit, Michigan.

Date April 19, 1943.

See Reverse Side for Regulations as to the Fees of Representatives for Services to a Party.

31 Section 403.713 (d) of Regulations, No. 3 of the Social Security Board provides:

"Fees for the services of a representative, appointed and qualified in accordance with paragraphs (a) and (b) of this section, may be charged and received from the party represented only as is provided in this paragraph.

"A fee in an amount not greater than $10.00 may be charged and received by an attorney who is admitted to practice before the highest court, or an inferior court, of a State, Territory, District, or insular possession or before the Supreme Court of the United States or an inferior Federal Court, and who is not otherwise prohibited by law from charging or receiving such a fee. Upon the petition of such an attorney the Bureau, a referee, or the Appeals Council may, for good cause shown authorize the attorney to charge and receive a maximum fee in excess of $10.00.

"No individual other than an attorney, as above provided, may charge or receive a fee unless he has filed a written petition therefor and has made a satisfactory showing in each case that he is not otherwise prohibited from charging or receiving a fee, that he has special qualifications which enable him to render valuable services to a party and that he has rendered such services to the party he represents. Upon the filing of such petition and the making of such showing the amount of any fee shall be determined in each case by the Bureau, a referee or the Appeals Council and no fee shall be charged or received in excess thereof."

Section 206 of the Social Security Act Amendments of 1939 provides:

"* * * Any person * * * who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum

fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee prescribed by
32 the Board shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both."

Form AC–501 (6–40)

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Request for hearing

IN THE CASE OF JOSEPH NIEROTKO (NAME OF CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER'S NAME); 385–10–5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

To the Social Security Board:

I disagree with the determination made on the above claim, and therefore request a hearing before a referee of the Social Security Board.

Remarks: (If you wish you may use this space for statement of reasons for disagreement).

I believe that the wages paid to me under the National Labor Relations Board ruling are taxable and therefore I should receive credit for them under Title VIII of the Social Security Act. I disagree with the ruling in the letter dated February 27, 1943 and desire a hearing in this matter.

(Signed) JOSEPH NIEROTKO,
Claimant.
Address—5751 St. Aubin, Detroit, Michigan.

Date 3/19/43.

33 ACKNOWLEDGMENT OF REQUEST FOR HEARING

Your request for a hearing (of which the above is a copy) was filed on 3/19/43 at 510 Lafayette Building, Detroit, Michigan. The referee will notify you of the time and place of the hearing at

least 10 days prior to the date which will be set for the hearing.

For the Social Security Board

By (Signature) CHAS. L. HICKEY,
Assistant Manager,
540 Lafayette Building, Detroit, Michigan.

To Mr. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit, Michigan.

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

OFFICE OF APPEALS COUNCIL

Transcript of hearing

IN THE CASE OF JOSEPH NIEROTKO (CLAIMANT); JOSEPH NIEROTKO (WAGE EARNER); 385-10-5766 (SOCIAL SECURITY ACCOUNT NO.)

Claim for Additional Wage Credits

ELSIE LEVAR,
Hearing Stenographer.

LOWELL W. RAYMOND,
Referee.

April 19, 1943, Detroit, Michigan.

34 *Opening statement*

Lowell W. Raymond, Referee: I want to explain at the outset, Mr. Nierotko, that this is not a court and I am not acting as a judge in a case between you and the Government. As a referee, I am interested generally in just two things, first, in finding out the complete facts concerning your employment and wages since January 1, 1937, and, second, in ascertaining whether in view of those facts the Social Security Board can legally give you wage credit in excess of that which is has already given you. Specifically, I am interested in ascertaining whether the Social Security Board can legally give you wage credit for the money which the Ford Motor Company paid you by reason of a ruling made by the National Labor Relations Board. I am sure you realize that the Social Security Board cannot legally grant wage credit to anyone who hasn't met all the wage requirements fixed in the law, and I am equally certain you understand that those requirements can be changed only by Congress. In view of those facts, and in view of the information that you have already received concerning this question, you can readily understand why the Board can-

not give you wage credit for the money which the Ford Motor Company paid you because of that ruling, unless the Board is convinced that that money represented remuneration for employment as that term is used in the Social Security Act.

I assure you the Board wants to grant you every benefit to which you are entitled under the law, and on the basis of the facts
35 in your case, and this is the Board's way of finding out those facts. As I said a moment ago, this is not a formal court proceeding and I want you to feel quite at ease during this hearing.

For the benefit of your attorney, Mr. Eden, I wish to explain that because of a statutory provision, when a representative of the Appeals Council conducts hearings of this sort, he is not required to observe the ordinary rules of testimony. The apparent reason for that provision is that Congress wanted the Social Security Board to get all the facts, including some that could occasionally be excluded by a strict application of the rules of testimony.

According to our records, Mr. Nierotko, the following is a brief history of your case up to this point. I wish you and Mr. Eden would follow this closely and when I am through tell me if you agree that it is a fair statement of your case up to today.

Our records show that in a statement made November 3, 1942, you said that between January 1937 and March 1942, inclusive, you had received from the Ford Motor Company wages in the amount of $7,916.05, explaining that $3,501.32 of it was paid to you pursuant to a ruling by the National Labor Relations Board, and that it pertained to a period from sometime in 1937 until August 1939 because you had been discharged in 1937 for union activities. The Bureau of Old-Age and Survivors Insurance of the Social Security Board gave you credit for all the wages claimed in your statement except the item of $3,501.32. The Bureau held that you were not entitled to wage credit for the $3,501.32 because that amount did not constitute remuneration for services rendered but was in the nature of a penalty and therefore did not constitute remuneration for employment. And on February 27, 1943, the Bureau sent you a letter to that effect.

On March 19, 1943, you appealed from that decision, contending that the $3,501.32 which you received as a result of the ruling of the National Labor Relations Board should be considered wages.

36 Under the circumstances, that is the only question to be considered at this hearing. Do you agree that that is a fair statement of the case up to this moment?

WITNESS. Yes; it is.

REFEREE. At this point, Mr. Nierotko, I want to introduce some papers into the record, and as I do, I want to explain them to you.

LIST OF EXHIBITS

Exhibits		Page No.
A	Form OAR-7008 dated November 3, 1942, signed by Joseph Nierotko	5
B	Copy of letter dated February 27, 1943, to Joseph Nierotko from the Social Security Board in regard to wages credited to his account	12 & 13
C	Report of contact dated April 19, 1943, made by a representative of the Social Security Board, after interviewing the Chief of the Employment Tax Division, Bureau of Internal Revenue, in regard to taxes paid on Joseph Nierotko's wages	

Transcript of hearing in the case of Joseph Nierotko to determine whether remuneration paid to him as a result of a ruling by the National Labor Relations Board was wages, Social Security Account Number 385-10-5766. The hearing was held at 9:00 A. M., April 19, 1943, at 631 Lafayette Building, Detroit, Michigan. The claimant was present and was represented by his attorney, Morton A. Eden.

37 Mr. JOSEPH NIEROTKO was called by the referee and, after being duly sworn, testified as follows:

Questions by LOWELL W. RAYMOND, Referee:

Q. Will you state your full name and your present address, please?

A. Joseph Nierotko, 5751 St. Aubin Ave., Detroit.

Q. What is you age, Mr. Nierotko?

A. 59.

Q. Have you worked for anybody besides the Ford Motor Company since January 1, 1937?

A. No.

Q. Am I correct in understanding that the only disagreement you have with the Social Security Board with reference to your wage credit is your disagreement over that item of $2,501.32 which you received as a result of the ruling by the National Labor Relations Board?

A. Yes.

Q. How long have you worked for the Ford Motor Company?

A. Since 1925.

Q. What is the nature of your work?

A. I have been a polisher.

Q. Did you stop working for the Ford Motor Company in 1937?

A. I was discharged by the Ford Motor Company for union activities on February 3, 1937.

Q. What was your rate of pay at that time, Mr. Nierotko?

A. $6.20 a day.

Q. Were any other employees discharged at the same time that you were and for the same reason?

A. I think there were, but I don't know for sure.

Q. Exactly when did you return to work at the Ford Motor Company?

A. September 1939.

Q. Do you have a copy of the ruling from the National Labor Relations Board as a result of which you got $3,501.32?

38 A. I do not have a copy, but my attorney does have.

Q. Did you receive any other correspondence from the National Labor Relations Board concerning its decision?

A. No.

(At this point, Mr. Eden, the claimant's attorney, requested that the referee admit into the record by reference the following: (1) The reported case, entitled, "In the matter of Ford Motor Company and International Union of United Automobile Workers of America," Case No. C-199, decided August 9, 1939, and reported in Volume 14 of the Decisions and Orders of the National Labor Relations Board, pages 346 to 410. (2) The reported case of the National Labor Relations Board vs. Ford Motor Company, 114 Fed. 2nd, P. 905. By its decision on October 8, 1940 in this case, the U. S. Circuit Court of Appeals for the 6th Circuit enforced (in part) the order made by the National Labor Relations Board on August 9, 1939, supra. (3) Report of action taken by the Supreme Court of the United States in the same case in denying a petition for certiorari on February 10, 1941. Case is reported in 312 U. S. 689. (Referee admitted this material to the record.))

Statement by Mr. EDEN, Attorney:

The sum of money involved in this case was paid pursuant to and computed in accordance to the foregoing order of the National Labor Relations Board, as enforced by the U. S. Circuit Court of Appeals for the Sixth District.

Q. Mr. Nierotko, where did you work between the time when you were discharged by the Ford Motor Company and the time you resumed your work?

A. I had no other work.

Q. During that time, did you live on your savings that you had made prior to that?

A. I had some money and my wife she worked. I tried to get a job but couldn't.

Q. Do you know, Mr. Nierotko, whether the Ford Motor Company paid unemployment compensation tax on the $3,501.32?

A. I don't know.

39 Q. Did the Ford Motor Company deduct your social security tax from the amount awarded you by the National Labor Relations Board?

A. The amount of $3,501.32 represented the amount due as wages only and my attorney can explain the rest of it.

Mr. Eden, attorney for claimant, explained the following from the records in his possession:

The one percent social security tax was not deducted from the total amount awarded to Mr. Nierotko by the National Labor Relations Board. That was true of all 25 cases included in the National Labor Relations Board's ruling of August 9, 1939, but in each of 3,000 subsequent cases the Ford Motor Company withheld the one percent social security tax (pending a final determination as to whether amounts paid under such ruling constitute wages), pursuant to an agreement with the union. There was no such agreement in this case.

Q. Mr. Nierotko, is there any additional statement that you would like to make?

A. No.

Q. If I should receive any additional evidence, do you want to see it and do you want your attorney to see it?

A. Yes; I want my attorney to see it.

REFEREE to attorney: Is there any argument or statement that you would like to make, Mr. Eden, for the record?

Statement

MR. EDEN, Attorney: In the case of Hector F. Manseau vs. United States of America, Civil Action 3555 now pending in the District Court of the United States for the Eastern District of Michigan, Southern Division, brought to recover income tax paid under protest, on back pay received from the Ford Motor Company by the plaintiff, under the same order of the National Labor Relations Board as is involved in the case of Mr. Nierotko, the Government contends that "The award of back pay fell within income 'derived from * * * wages or compensation for personal services,'" referring to section 22 (a) of the Internal Revenue Code, which defines income.

(Attorney for claimant presented an unsigned list of the 25 men whose rights were considered by the National Labor Relations Board in its Case No. C-199 and who were awarded back pay by the National Labor Relations Board at the same time the claimant was awarded his. According to the list, the amounts of total back pay awarded ranged from slightly over $2,000 to more than $5,000 each; in each case the National Labor Relations Board deducted from the total "back pay" earnings, if any, received by the employee during the period involved, and granted an award called "net amount." The referee did not consider it necessary to retain for the record a copy of the list.)

REFEREE to claimant: That is all I want to ask you, Mr. Nierotko. If I get additional information from the Ford Motor Company I

will let Mr. Eden see it. I may make the decision in this case, or it may be made in Washington, but irrespective of where it is made, it will be done just as soon as we can do it, consistent with a careful study of the evidence and the applicable law. You will be informed just as soon as the decision is made.

We have read the foregoing and hereby certify that it is a true and complete statement of the questions and answers constituting the examination.

LOWELL W. RAYMOND,
Referee.

ELSIE LEVAR,
Hearing Stenographer.

The record was reopened on May 4, 1943, for the purpose of admitting the following document in evidence. The pertinent part of this letter has been brought to the attention of the claimant's representative:

Exhibit D—Letter from the Ford Motor Company address to the manager of the Dearborn, Michigan, field office, dated April 29, 1943.

40–A

Exhibit A

Corrected Form

Form OAR–7008 (8–40).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

(To be filled out by wage earner)

Date 11–3–42.

SOCIAL SECURITY BOARD, *Baltimore, Md.*

I have received your statement of my wage credits for the years from Jan. 1937 to Septm. 1939 but to the best of my knowledge it is not correct.

1. My name as it appears on my account number card is Joseph Nierotko.

2. My employer may have reported my name as Ford Motor Company.

3. My account number is 385–40–5766. 4. My date of birth is 3–16–94 1884.

5. Other account numbers I have used are prepare wheels to polishing.

6. My present address is 5751 St. Aubin, Detroit, Michigan.

7. Telephone number where I can be reached is Cadillac 7052.

The Social Security Board may disclose my name to my employer if, in securing wage information, it is found to be necessary. Yes ☒; No ☐.

(Signature) JOSEPH NIEROTKO.

STATEMENT OF WAGES AND EMPLOYMENT

(Read instructions on other side)

Show in date order your employment for the year(s) in question.

I Worked	Name of employer (give business or firm name)	Total pay received (include also any wages other than cash)	Kind of work done by me
From Jan. 1937 to Feb. 1937	1. Name, Ford Motor Company City and State, Dearborn, Michigan Type of business, Auto Mfr.	$110.00	Metal Polisher
From 1937 to Aug. 1940	2. Name, Ford Motor Co. City and State, Dearborn, Michigan	$3,301.32	No work performed and wages paid under ruling by NLRB
From Sept. 1940 to Mar. 1942	3. Name, Ford Motor Company City and State, Dearborn, Michigan	$1,267.13	Metal Polisher

(Use other side of this sheet if more space is needed)

40-B

INSTRUCTIONS

If you worked for more than seven employers during the period for which amounts are questioned, give the same information for others on a blank sheet attached to this statement.

Be sure to give all names and all account numbers under which you worked. If your employer used a nickname for you on his pay roll, give that. If you worked under your maiden name and are now married, give both names.

Give the business names of your employers; not the names of supervisors or foremen. Example: Central Construction Company.

In giving the nature of your employer's business, be as clear as possible. Examples: Retail grocery store; foundry; construction company. If he had several businesses give only the one where your worked.

In giving the nature of your work be as clear as possible. Examples: Clerk in store; traveling salesman on commission; carpenter; stenographer.

If part of your pay was not in cash show what it was in the column listing "Total Pay Received." Example: $260 plus 6 meals a week.

Wages are credited to your account in the quarter in which they were paid. (A quarter is three calendar months as follows: January 1 to March 31; April 1 to June 30; July 1 to September 30; October 1 to December 31. If you earned wages in any quarter which were not paid in that quarter, indicate when payment was made.)

When you have filled out this form, mail it in an envelope to: Social Security Board, Baltimore, Md.

41 *Exhibit B*

14:WR:CW

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

WASHINGTON

FEBRUARY 27, 1943.

Re: Account Number 385-10-5766

MR. JOSEPH NIEROTKO,
5751 St. Aubin, Detroit Michigan.

DEAR MR. NIEROTKO: This is in further reference to your request for a statement of the amount of wages credited to your Old Age and Survivors Insurance account.

Our records show wages now credited to your account as follows:

1937 yearly total	$149.60
1939 yearly total	426.28
1940 yearly total	1,324.54
1941 yearly total	1,955.70
1/1/42—3/31/42	558.61
4/1/42—6/30/42	625.60
Grand total	5,040.33

You stated on the Form OAR-7008 completed by you that as a result of the action by the National Labor Relations Board, you were paid the sum of $3,501.32 by the Ford Motor Company.

The term "wages" as defined by the Social Security Act means all remuneration for "employment." "Employment" means any service of whatever nature performed within the United States by an employee for his employer unless specifically excluded by the Social Security Act as amended. The payment made to you by the Ford Motor Company was in the nature of damages

42 and did not constitute remuneration for employment. This

amount, therefore, cannot be credited to your Old-Age and Survivors Insurance account.

We have been informed by our field office that you would disagree with a finding by the Social Security Board that the amount in question was not wages as that term is defined in the Act. If you wish to have a hearing in this matter before a referee you should contact our field office at 304 Federal Building, Detroit, Michigan, and inform them that you wish them to proceed with your request for a hearing.

A wage statement furnished you by this office may not include all of your wages for the last two completed quarters because of the time required to receive and record reported wages.

Sincerely yours,

O. C. PEGGE, *Director.*

cc: FO—304 Federal Bldg., Detroit, Michigan.
mso: gm.

Exhibit C

Form OAC–5002 (10–39).

FEDERAL SECURITY AGENCY

SOCIAL SECURITY BOARD

BUREAU OF OLD-AGE AND SURVIVORS INSURANCE

Report of Contact

Name: Joseph Nierotko. Address: 5751 St. Aubin, Detroit, Michigan. Office: Detroit, Michigan. Date: April 19, 1943. Account No. 385–10–5766.

Person contacted: Mr. Swanson, Chief Employment Tax Division. Address: Collector of Internal Revenue, Detroit, Michigan.

43 Contact made: By telephone. Place of contact: Give brief statement of information requested and given:

Mr. Swanson was called to determine whether the Ford Motor Company had paid the unemployment compensation taxes with respect to wage payments ordered by the National Labor Relations Board.

He stated that conversations were held with administrative officials of the Ford Motor Company relative to the tax and they understand that the tax should be paid. The conversations were specifically in relation to how the payments were to be made. Mr. Swanson stated that it could not be determined from their files which tax payments were specifically National Labor Relations Board wages, but he feels that such tax payments were made.

Contact made by Zeldon S. Cohen, Administrative Assistant, OA & SI.

(This form must be filled out in ink or on typewriter, as it becomes a permanent record.)

Exhibit D

FORD MOTOR COMPANY
3000 Schaefer Road
DEARBORN, MICHIGAN

APRIL 29, 1943.

Mr. ROBERT G. MISH.
Manager, Social Security Board Field Office,
14216 Michigan Avenue, Dearborn, Michigan.

DEAR SIR: This refers to your letter dated April 1, 1943, addressed to the attention of Mr. D. C. Moffitt, Auditing Department, in which you request certain information in regard to Mr. John Cwikiel, Social Security No. 367–07–9734, and Mr. Joseph
44 Nierotko, Social Security No. 385–10–5766. The information requested relates to certain amounts paid by Ford Motor Company to the individuals named in accordance with an order of the National Labor Relations Board as modified by the United States Circuit Court of Appeals.

With reference to your request for a copy of the National Labor Relations Board decision, it occurs to us that it would better serve the purpose of the regional claims referee if he would refer to the official report of this decision and order which will be found in 14 NLRB 346 and to the official report of the opinion of the United States Circuit Court of Appeals which will be found in 114 Fed. (2d) 905, rather than to use such excerpts from that order and opinion as might be selected by this company.

The following is the information, as shown in the records of this company, which is requested in regard to Mr. Joseph Nierotko, Social Security No. 385–10–5766, following the questions contained in your letter:

(a) Q. Period of employment—how long was individual employed and nature of duties since January 1, 1937?

A. Hired prior to January 1, 1937. Worked to February 3, 1937. Occupation—Polisher.

(b) Q. Date of National Labor Relations Board ruling or action?

A. National Labor Relations Board order dated August 9, 1939.

(c) Q. Date of employee's discharge; cause of discharge?

A. Records show paid off February 3, 1937. (Since it seems that the cause of the termination of service would have no bearing

on any question involved in a determination of benefits under the Social Security Act, this information is omitted.)

(d) Q. Amount of "back pay" paid to individual; date of payment; period covered by "back pay"?

A. Net amount paid to Joseph Nierotko, $2,501.32. Date of payment: June 18, 1941. Period covered: February 2, 1937, to September 25, 1939.

45 (e) Q. During period covered by "back pay" was any work performed by this individual? Was individual considered an "employee? Was he subject to call during that period? Was he considered an employee for any purpose? Was he removed from active roll?

A. No work was performed for Ford Motor Company by this individual during the period covered by "back pay." This individual was removed from the active roll, was not considered an employee for any purpose, and was not subject to call during the "back pay" period.

(f) Q. Has the company paid either the social security tax, unemployment compensation tax, or workmen's compensation tax on the "back pay"?

A. This company has not paid any taxes or contributions based upon this "back pay" under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, or under the Michigan Unemployment Compensation Act. There is no workmen's compensation tax on remuneration for services performed under the laws of Michigan.

In this connection it is desired to mention that this company would like an opportunity to be heard, at some time before final determination, in any proceeding involving the question whether so-called "back pay" awards of the National Labor Relations Board constitute "wages" within the meaning of the Social Security Act, as amended, or the Federal Insurance Contributions Act, as amended, or the Federal Unemployment Tax Act, as amended.

Yours very truly,

FORD MOTOR COMPANY,
L. E. BRIGGS,
Auditing Department.

LEB:vb.

46 In United States District Court

Notice of hearing on motion for summary judgment

Filed June 13, 1944

To the Clerk of said Court:

Please place the attached Motion for Summary Judgment in the above entitled cause on the motion docket of the Honorable Edward J. Moinet, District Judge, for Monday, June 12, 1944, at 10 o'clock A. M.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant.

To: ERNEST GOODMAN and MORTON A. EDEN,
Plaintiff's Attorneys, 3220 Barlum Tower, Detroit 26, Michigan.

Please take notice that the attached Motion for Summary Judgment in the above entitled cause will be brought on for hearing before the Honorable Edward J. Moinet, District Judge, in his courtroom in the Federal Building at Detroit, Michigan, on Monday, June 12, 1944 at 10 o'clock A. M.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: June 3, 1944.

47 In United States District Court

Motion for summary judgment

Filed June 13, 1944

Now comes the defendant, the Social Security Board, and respectfully moves this court for summary judgment in the above-entitled action pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law; and for judgment in accordance with Section

205 (g) of the Social Security Act Amendments of 1939 affirming the decision of the Social Security Board under review herein.

JOHN C. LEHR,
United States Attorney,
By ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorneys for Defendant, Social Security Board.

In United States District Court

Order granting defendants motion for summary judgment on the pleadings

Aug. 4, 1944

The motion of the defendant for a summary judgment on the pleadings in this cause having come on for hearing, the arguments of counsel having been heard, and it appearing that there is no genuine issue as to any material fact, that the moneys paid by the Ford Motor Company to the plaintiff, pursuant to a "back pay" award entered under the National Labor Relations Act, covering the period February 2, 1937 to September 25, 1939,
48 do not constitute "wages" as defined by Section 210 (a) of the Social Security Act of 1935, because they are not "remunerative for employment" and accordingly could not and cannot be credited to his Old Age and Survivors Insurance Account under the provisions of the Social Security Act, and that the defendant therefore is entitled to a judgment herein as a matter of law.

It is ordered, adjudged and decreed that the motion of the defendant for a summary judgment on the pleadings herein be and the same hereby is granted, and judgment is entered herein for the defendant and against the plaintiff, with costs.

EDWARD J. MOINET,
District Judge.

U. S. DISTRICT COURT,
Eastern District of Michigan, ss:

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

GEORGE M. READ,
Clerk.
By JOHN J. GINTHER,
Deputy Clerk.

Dated August 4, 1944.

In United States District Court

Notice of appeal to circuit court of appeals

Filed August 30, 1944

Notice is hereby given that Joseph Nierotko, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the Order Granting Defendant's Motion for Summary Judgment on the Pleadings entered in this action on August 4, 1944.

ERNEST GOODMAN and MORTON EDEN,
Attorneys for Appellant,
3220 Barlum Tower, Detroit 26, Michigan.

Dated August 30, 1944.

49 In United States District Court

Proof of mailing of notice of appeal

Filed September 1, 1944

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, George M. Read, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that I did, on the 1st day of September A. D. 1944, send by mail copy of the Notice of Appeal and of bond for costs on appeal in the above entitled cause to the following named persons at the address given:

John C. Lehr, U. S. Attorney, 829 Federal Building, Detroit 26, Michigan; Arnold W. Lungerhausen, Asst. U. S. Attorney.

GEORGE M. READ,
Clerk,
By ALBERT L. ALLRED,
Deputy Clerk.

Dated Detroit, September 1, 1944.

In United States District Court

Stipulation as to contents of record on appeal

Filed September 26, 1944

It is hereby stipulated and agreed by and between the above parties, through their respective attorneys, that the following

documents filed in this cause shall constitute the entire record on appeal to the Circuit Court of Appeals in this cause:

1. Complaint.
2. Answer.
3. Notice of hearing on Motion for Summary Judgment.
4. Motion for Summary Judgment.
5. Order Granting Defendant's Motion for Summary Judgment on the Pleadings.

50 6. Notice of Appeal.

7. Proof of mailing of notice of appeal.
8. Within stipulation as to contents of record on appeal.
9. Stipulation of counsel approving transcript of record.
10. Clerk's certificate to transcript.

It is further stipulated and agreed that the Record on Appeal as filed be certified and transmitted by the Clerk of the District Court to the United States Circuit Court of Appeals for the Sixth Circuit, without the necessity of comparing the same with the originals on file.

ERNEST GOODMAN and MORTON A. EDEN,
Attorneys for Plaintiff.

JOHN C. LEHR,
United States Attorney.
BY ARNOLD W. LUNGERHAUSEN,
Assistant United States Attorney,
Attorney for Defendant.

Dated at Detroit, Michigan, this 25th day of September 1944.

In United States District Court

Order extending time within which to file and docket record on appeal

Filed October 5, 1944

51 On reading and filing the stipulation of attorneys for plaintiff and defendant in the above-entitled cause for an extension of time within which to file and docket the Record on Appeal in said cause.

It is ordered that the time within which to file and docket the Record on Appeal in the above-entitled cause may be and hereby is extended to November 27, 1944.

EDWARD J. MOINET,
District Judge.

In United States District Court

Stipulation extending time within which to file and docket record on appeal

Filed October 5, 1944

It is hereby stipulated and agreed by and between the above parties through their respective counsel that the time within which to file and docket the record on appeal in the above-entitled cause may be extended to November 27, 1944.

ERNEST GOODMAN and MORTON A. EDEN,
Attorneys for Plaintiff.
JOHN C. LEHR, *United States Attorney,*
By ARNOLD W. LUNGERHAUSEN,
Assistant U. S. Attorney.
Attorneys for Defendant.

Dated at Detroit, Michigan, this 5th day of October 1944.

52 [Clerk's certificate to foregoing transcript omitted in printing.]

53 In United States Circuit Court of Appeals, Sixth Circuit

Cause argued and submitted

April 3, 1945

Before SIMONS, ALLEN, and HAMILTON, JJ.

This cause is argued by Ernest Goodman for Appellant and by Hubert H. Margolies and C. T. Dinn for Appellee and is submitted to the court.

In United States Circuit Court of Appeals, Sixth Circuit

Judgment

Entered: May 14, 1945

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and the cause remanded

for further proceedings in conformity with the opinion of this court.

[File endorsement omitted.]

54 In United States Circuit Court of Appeals, Sixth Circuit

No. 9896

JOSEPH NIEROTKO, APPELLANT

v.

SOCIAL SECURITY BOARD, APPELLEE

Appeal From the District Court of the United States for the Eastern District of Michigan, Southern Division

Before SIMONS, ALLEN, and HAMILTON, Circuit Judges.

Opinion

Filed May 14, 1945

SIMONS, Circuit Judge. So far as federal reviewing courts are concerned, the legal issue presented by the appeal is one of first impression, and simply stated is whether "back pay" awards made by an employer in compliance with an order of the National Labor Relations Board, constitute "wages" under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account. The Social Security Board refuses to consider such awards as wages and the district court upheld its position in the present suit against it, by entering summary judgment for the defendant upon the pleadings.

The appellant is one of a number of employees of the Ford Motor Company, discharged on February 2, 1937, because of union activities. He was subsequently reinstated as an employee in response to an order of the National Labor Relations Board of August 9, 1939, the enforcement of which was by us directed in National Labor Relations Board v. Ford Motor Co., 114 Fed. (2d) 905 (cert. den. 312 U. S. 689). On July 18, 1941, the Ford
55 Motor Company paid the appellant $3501.32 as back pay covering the period February 2, 1937 to September 25, 1939, since he failed to secure other employment during that time. Under agreement, however, the company is withholding 1% of this amount for the appellant's Social Security tax pending the outcome of the present litigation, and so presumably will not claim immunity from the excise tax in equivalent percentage.

The Bureau of Old Age and Survivors Insurance of the Social Security Board refused to credit the back pay award on the ground that it does not constitute wages. The appellant appealed from the Bureau's determination to a referee who, upon hearing, affirmed its determination, and upon subsequent appeal to the appeals council of the Social Security Board, the referee's decision was affirmed. The present suit was brought under § 205 (g) of the Social Security Act. It is not a class suit, but we are advised that it is of major importance as a test case involving the status of thousands of back pay awards ordered by the National Labor Relations Board to illegally discharged employees throughout the country.

Section 2 (d) of the National Labor Relations Act [49 Stat. L. 453 (1935)] defines an employee as:

"Any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

Section 10 (c) of the Act authorizes the Labor Board, in addition to issuing cease and desist orders directed to employes guilty of unfair labor practices, to command "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

Section 209 (a) of the Social Security Act defines "wages," for the purpose of the Old Age and Survivors Program, to mean "all remuneration for employment." Section 209 (b) defines "employment" as "any service, of whatever nature, performed by an employee for the person employing him." The basis for the Board's decision, therefore, is that notwithstanding the definition of an employee in the National Labor Relations Act, back pay awarded by the National Labor Relations Board is not remuneration for service performed within the meaning of the Social Security Act, for the illegally discharged employee performs no service for his employer and the award, therefore, is not wages within the purview of the latter Act; that though the effect
56 of an award of back pay may be to give the employee the same amount of money as he would have received had service been performed, it is not given him as wages.

In addition to justifying its decision by the letter of the Act, the Board suggests administrative difficulties in treating back pay as current wages during the period of unlawful discharge. It says that back pay is, of necessity, awarded and paid in quarters subsequent to those in which the individual was without work, and inasmuch as § 209 (g) of the Act defines quarters of coverage as calendar quarters, an individual could only count as a quarter of

coverage the calendar quarter in which the award was paid. This suggestion may easily be dismissed. If, upon consideration of the great humanitarian purpose of the Social Security Act in all of its aspects, it should be found that there is no statutory imperative that unlawfully discharged employees be denied its benefits, administrative difficulties in treating subsequently paid compensation as currently received wages are but meager support for the position of the Board. That such difficulties are not insuperable is demonstrated by its practice in crediting to the employee the differential between wages paid and the legal minimum under the Fair Labor Standards Act when payment is made in pursuance of an administrative order or a court decree.

The basic problem does not, however, yield to such simple solution, and difficulty is enhanced by the construction put upon back pay by other administrative agencies. The Commissioner of Internal Revenue, it is said, has held that back pay does not constitute wages within the meaning of Titles VIII and IX of the Social Security Act, and that the amounts paid were "on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services." So the Labor Board has held that there need be no withholding from back pay for Social Security taxes. Pennsylvania Furnace & Iron Co., 13 N. L. R. B., 49, 55–56. Back pay has been held deductible for income tax purposes as an ordinary and necessary expense, but in a decision rendered October 15, 1942, the Comptroller General has ruled that a back pay settlement, before entry of a Labor Board order, was not a reimbursable item of cost under a cost-plus-fixed-fee contract. Resulting from the fault of the employer, the item could not be shifted to the government. It is therefore argued that consistency of construction by administrative agencies should not be disturbed by the courts under the doctrine applied in Brewster v. Gage, 280 U. S., 327, 336; Fawcus Machine Co. v. U. S., 282 U. S. 375, 378; Norwegian Nitrogen Co. v. U. S., 288 U. S. 294, 315. But the statutes here involved are of such recent enactment, and the problem relatively so new, that we may well doubt that administrative construction is now so crystallized and frozen into the law that it should escape the consideration of courts, or that the failure of a Congress, absorbed in implementing the most colossal war effort of all time, to amend or clarify the Act, implies agreement with administrative interpretation of the legislative purpose.

To the man in the street or at the bench or machine, "wages" and "pay" are undoubtedly synonymous, and "back pay" suggests pay currently earned even though not currently received. This

accords with dictionary definitions. Webster's International Dictionary defines "pay" as "remuneration, wages, salary," and "wages" as synonymous with "pay."

But it is said by the Board that the incidents and characteristics of an award of back pay are such that it is more appropriately classified as in the nature of damages and reparation for loss than as remuneration for service performed; that the concept of back pay does not fit into the pattern for wages established in Title II of the Social Security Act and in the corresponding provisions of the Federal Insurance Contribution Act; that wages are tied to service performed, whereas back pay, like damages, is intended merely to put the worker in as good condition as he would have been but for the unlawful conduct of his employer. Back pay, it is urged, is compensatory, and it is untenable to hold it to be wages upon some theory of constructive earnings, or by resort to a fiction, or to so classify it by judicial fiat. Wages are not, however, always earned by the expenditure of physical or mental effort on the part of the employee. This the Board recognizes when it includes within the term "wages," vacation pay, sick and disability pay, pay while on state National Guard duty, retainer fees to consultants, etc. Social Security Board, Regulations No. 3, §§ 403.827; Social Security Board, Unemployment Compensation Interpretation Service, Federal Series, 1937, 47 SST 49. Instances may be multiplied where wages are paid not for current effort but in consideration of an employer's command of the employee's time, and wages are no less earned when an employee holds himself in readiness to perform, than when he actually performs. "They also serve, who only stand and wait."

This aspect of wages is not without recognition by the courts. In re B. H. Gladding Co., 120 Fed. 709 (D. C. R. I.). The concept that back pay is, by its nature, damages or a penalty, has been expressly rejected. Agwilines v. N. L. R. B., 87 Fed. (2d) 146 (C. C. A. 5); Republic Steel Corp. v. N. L. R. B., 311 U. S. 7. The power to command affirmative action is remedial, not punitive. Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197. The concept of back pay in the National Labor Relations Act, as it has been developed in innumerable decisions of the Supreme Court and the several Courts of Appeal, is that it is a remedial device to restore the employee, in all respects, to a status extant prior to his unlawful discharge, and so associated are the terms "wages" and "back pay" that they are often used interchangeably by courts, as witness the separate opinion of Mr. Justice Black and Mr. Justice Douglas in the Republic Steel Case, supra. The "make whole" objective of the back pay order has been construed so that the employee is entitled, upon reinstatement,

not only to the wages he would have earned, but to all other rights that would have accrued to him by reason of his employment had he not been unlawfully discharged. These have been held to include insurance rights, vacation rights, and seniority status. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1; Republic Steel Corp., v. N. L. R. B., supra; Republic Steel Corp. v. N. L. R. B., 114 Fed. (2) 820; Third Annual Report of National Labor Relations Board, page 209. In Labor Board v. Waterman S S Co., 309 U. S. 206, 218, it was said, "In the words of the Act, an employer cannot terminate his employees' tenure of employment, or any term or condition of employment because of union activity or affiliation. * * * They embrace, as well, all elements of the employment relationship which in fact customarily attended employment. * * *"

We are asked to hold that of the rights of an unlawfully discharged employee protected by the Labor Act, all may be preserved, by administrative order, except the single right which in the exegencies of a post-war period may be the most important, and this on the ground that its preservation is precluded by a definition of employment as "service of whatever nature performed by an employee for the person employing him." The continuity of the employment relationship between an employer and his unlawfully discharged employee, under the National Labor Relations Act, is not denied. The right to compensation equal to wages is not denied. The point stressed is that the Act requires service, with connotation given to that term, so that it applies only when some physical or mental effort is expended by the employee on behalf of the employer. But "service" is not so or otherwise
59 defined. The Congress was concerned primarily with compensation as a yard-stick for both employer and employee contributions. If wages were paid they measured both the tax and the excise. Clearly it was not a condition contributing to either the humanitarian or economic purpose of the Act to determine whether the wages were earned or how. It is pointed out persuasively, we think, by Michael Fooner, formerly Associate Administrative Analyst for the Board, in 41 Michigan Law Review, 60, that if this extreme view were accepted it would place upon the Social Security Board an administrative burden, unique in character and far flung in its implications, and this, we think, is important. If services performed in the asserted meaning of that phrase, is a statutory element in the concept of wages, must there not then be an inquiry in every case as to whether the wages were earned by service? Admitting a contract of employment, an obligation to pay, and the liquidation of the obligation by payment, are the benefits of the Act not to be denied under the reason-

ing of the Board when no labor is performed? Tested by reductio ad absurdum, its construction may not stand.

It is a familiar principle that we may look to the whole Act to ascertain the precise meaning of any of its provisions. We turn to an analysis of the Social Security Act in Helvering v. Davis, 301 U. S 619. There we find that Title VIII applies to different types of tax—an income tax on employees, and an excise tax on employers. The income tax on employees is measured by wages paid during the calendar year (§ 801). The excise tax on the employer is to be paid "with respect to having individuals in his employ," and like the tax on employees is measured by wages (§ 804). In the computation of wages all remuneration is to be included except so much as is in excess of $3,000 [§ 811 (a)]. The income tax on employees is to be collected by the employer who is to deduct the amount from the wages "as and when paid" [§ 802 (a)]. These provisions speak in terms of a standard applied to remuneration paid to the employee in pursuance of an employment contract, or as the result of an employer-employee relationship, whenever received or however paid. The Social Security tax on the employee is a tax on income. If income, under the Internal Revenue Laws, is it not equally income under the Social Security Law?

When we give consideration to the rationalization in Helvering v. Davis, supra, by which the power of Congress to enact the Social Security Act under the General Welfare Clause, was sustained, the reasoning that the award of old age benefits was in response

> to a problem national in area and dimensions, to save men
60 and women from the rigors of poverty and the haunting
> fear that such a lot awaits them, and when we consider that its enactment followed hard upon the passage of the National Labor Relations Act, and that both were the result of a coordinated national labor policy designed to mitigate the hardships of an economic crisis which impelled the adoption of both, it seems inconceivable that the Congress, in its concurrent endeavor to prevent labor strife and preserve the continuity and stability of labor remuneration, could have intended that Social Security benefits should be denied to a large class of employees reasonably expected to come into existence by virtue of the remedial provisions of the National Labor Relations Act, and this by a definition of employment which, as now sought to be interpreted, is in conflict with its meaning in the earlier statute, unrealistic in the light of human experience, and may well have been purely fortuitous.

We are told that the Labor Board has not attempted to characterize back pay as wages within the meaning of the Social Security Act, nor, assuming feasibility and jurisdiction to enter such an order, has it found that creditability as wages under the Social Security Act is necessary to effectuate the purposes of the Labor Act

generally, or in the particular situation giving rise to this appeal. That may be so, but that the Labor Board has not conceived of back pay as wages, is not so. In N. L. R. B. v. Killoren, 112 Fed. (2d) 609 (C. C. A. 8), the Labor Board, as plaintiff, in its role as trustee for employees entitled to back pay, succeeded in obtaining an adjudication that a back pay award constituted wages in the payment of which employees were entitled to the priority accorded employees under § 64 of the Bankruptcy Act, 11 U. S. C. A. 104. The court there rejected the notion that a back pay award was an allowance in the nature of damages, and, basing its decision upon a determination that Congress had specifically designated the allowance as back pay in a continued employment status, held that this sufficiently constituted the award as wages earned "to eliminate legal shadows."

The Congressional concept of back pay as current wages in a continuous employment relationship, is now illuminated by § 119 of the Revenue Act of 1943, amending § 107 by adding subsection (d) under which employees may allocate back pay awards over the period of discharge, and file amended income tax returns to include back pay as income for the years it would have been received, but for the unlawful discharge. The concept is not
destroyed but emphasized and clarified (so as to avoid
61 a construction equivalent to that here made) by distinguishing back pay from wages generally.

The National Labor Relations Act is designed to secure to employees their right freely to organize and designate bargaining agents. Discharge for activity in the exercise of such right is declared to be an unfair labor practice, empowering the administrative agency to take such affirmative action as will effectuate the policies of the Act. This includes a restoration of the employee to his original status without impairment of any right originally possessed. We may not say that rights, the exercise of which it is national policy to encourage, may be exercised only at the peril of surrendering rights under other social legislation created for the protection of the same persons. It is true that the surrender is only for the duration of the unlawful discharge and that in many cases the credit for both income and excise percentages will be small. The principle is, however, important. Rights which the Labor Act protects are not by the Social Security Act destroyed. We agree with Fooner, supra, that this would be allowing principles of the Social Security Act to be thwarted by an employer's illegal act, and that it is precisely against the effects of such acts that national labor and social legislation has been created.

Judgment reversed and the cause remanded for further proceedings in conformity herewith.

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.

[Endorsement on cover:] File No. 50021. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 318. The Social Security Board, Petitioner vs. Joseph Nierotko. Petition for a writ of certiorari and exhibit thereto. Filed August 13, 1945. Term No. 318 O. T. 1945.

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